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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LUCIO GONZALEZ, Defendant and Appellant.	B205742 (Los Angeles County Super. Ct. No. VA087067)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael L. Schuur, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillete, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Stephanie A. Miyoshi and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Lucio Gonzalez of, among other things, two counts of burglary based on his entry, first, into the victims' garage and, second, into the victims' house. On appeal, defendant contends that he made a single entry; hence, he can be convicted of only one count of burglary. He also contends that his upper term sentences violate *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*). We disagree with these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

On the evening of December 30, 2000, Jose Alvarez left his house to pick up dinner. Alvarez's girlfriend, Sylvia, and their eight-month-old son, Walter, lived with Alvarez and were at home. The house had an attached garage, although no door directly led from the house into the garage. Rather, the garage had a side door that opened to the back yard.

When Alvarez left that night, he left the garage door open and the garage lights off. The garage side door was closed. He returned about 30 minutes later. The garage lights were on. Two men were inside the garage. Defendant was one of the men. Both men wore dark clothing, sunglasses and caps. Upon seeing them, Alvarez reversed his car, but the men pulled out nine millimeter semiautomatic guns and pointed them at the car. Alvarez stopped the car and got out.

The men demanded money. Alvarez told them they could have the car. He gave them his wallet and money he had in his pocket. Defendant, however, insisted that what they wanted was inside the house. Alvarez owned a catering business, and at times he kept large amounts of money in the house. At the time of the incident, he had about $8,000-$10,000 in the house.

At that point, Sylvia opened the front door to the house. She saw two men pointing guns at Alvarez's head. Defendant's accomplice ran to her and pointed a gun at her. The men made Sylvia and Alvarez go into the house. Defendant kept asking for

money. He told Alvarez to get on his hands and knees. Defendant kicked Alvarez and ordered his accomplice to tie Alvarez up.

Defendant left the room with Sylvia, while his companion stood guard over Alvarez. Sylvia and defendant went to a bedroom where the baby was sleeping. Sylvia gave defendant jewelry and some money from her purse, but defendant kept shouting, "Where is the stack of money?" Defendant put the gun to the baby's forehead, and asked, " 'What do you want me to blast first you or your son?' " Defendant then told Sylvia to take off her pants, but she told him she was on her period. While pointing a gun at her head, defendant forced Sylvia to orally copulate him. He ejaculated in her mouth. He also urinated in her mouth and on her face. She spit his semen onto the carpet.

Before they left, one of the men removed Alvarez's driver's license from his wallet and told him, " 'We know who you are, mother fucker. So, you better not do anything.' "

The case remained unsolved until late 2004, when police got a lead. On January 13, 2005, Alvarez was shown a photographic line-up in which defendant was in position No. 3. He was unable to identify anyone in the line-up. But at a live line-up on July 5, 2005 he identified the person in position No. 5, defendant, as one of the men who robbed him.

Sperm was found on carpet in Sylvia's room. A DNA analysis was conducted using a sample taken from defendant and a piece of carpet from the room. Defendant's DNA was a match at 14 genetic chromosomes. The frequency of finding defendant's genetic profile in the Caucasian population is one out of 16.1 quadrillion; one out of 1.1 quintillion in the Black population; and one out of 7.6 quadrillion in the Hispanic population. There are almost 7 billion people in the world.

II. Procedural background.

Trial was by jury. On November 7, 2007, the jury found defendant guilty of count 1, forcible oral copulation of Sylvia (Pen. Code, § 288a, subd. (c)(2));[1] count 2, the

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[1] All further undesignated statutory references are to the Penal Code.

second degree robbery of Alvarez (§ 211); count 3, the first degree robbery of Alvarez; count 4, the first degree robbery of Sylvia; count 5, first degree burglary of a building occupied by Alvarez (§ 459); count 6, the first degree burglary of a building occupied by Sylvia; and count 7, the assault with a semiautomatic firearm on Walter, the baby (§ 245, subd. (b)). The jury found true as to counts 1, 2, 3, 4 and 7 the allegation that defendant personally used a firearm during the commission of the offenses. As to count 6, the jury found true the allegation that another person, other than an accomplice, was present during the commission of the offense.

On January 7, 2008, the trial court sentenced defendant to 25 years to life on count 1. The court selected count 7 as the base term, and imposed the upper term of 9 years plus the upper term of 10 years under section 12022.5, subdivision (b). The court also imposed two 1 year, 4 months consecutive sentences for counts 3 and 4. The court imposed midterm sentences as to counts 2, 5 and 6, but stayed the sentences under section 654. The court also stayed the sentences on the gun enhancements on counts 3 and 4.

This timely appeal followed.

DISCUSSION

I. Defendant could properly be convicted of two counts of burglary.

Defendant was convicted of two counts of burglary: first, burglary of a building occupied by Alvarez (the garage), and, second, burglary of a building occupied by Sylvia (the house). Defendant contends that he could only be convicted of a single burglary, and therefore one of the burglary verdicts must be vacated. We disagree.

Section 459 provides in part, that one who "enters any house, room, apartment, . . . or other building . . . with intent to commit . . . larceny or any felony is guilty of burglary." "Under section 459, burglary consists of an unlawful entry with the intent to commit a felony. Thus, the crime is *complete*, i.e., one may be prosecuted and held liable for burglary, upon entry with the requisite intent. (*People v. Montoya* [(1994)] 7 Cal.4th [1027,] 1041-1042.) It follows, therefore, that every entry with the requisite intent supports a separate conviction." (*People v. Washington* (1996) 50 Cal.App.4th 568, 578-

579 (*Washington*) [the defendant, who entered an apartment twice in one day, the second entry occurring several hours after the first, could be convicted of two counts of burglary]. "The gist of burglary is the entry into a structure with felonious intent. Technically at least, a new burglary occurs with every new entry." (*In re William S.* (1989) 208 Cal.App.3d 313, 317.) A different burglary occurs each time the perpetrator enters a separate dwelling space if a new and separate danger is posed to each of the occupants upon entry into each dwelling. (*People v. Richardson* (2004) 117 Cal.App.4th 570.)[2]

Under this authority, we conclude that defendant could properly be convicted of two separate burglaries. Although the garage was attached to the house, a person could not enter the house directly from the garage. Rather, the garage had just two doors, a front door out of which cars could enter and exit and a side door leading to the back yard. Defendant and his accomplice apparently entered the garage through the front door, which Alvarez left open. They thereafter entered the house through the house's front door when Sylvia unwittingly opened it. These facts show that there were *two* entries. Therefore, under *Washington*, each separate entry constitutes a burglary.

Defendant acknowledges the *Washington* rule, but asks us to adopt a new "hybrid test" based on *People v. Bailey* (1961) 55 Cal.2d 514 (*Bailey*) and *In re William S., supra,* 208 Cal.App.3d 313.[3] In *Bailey*, the defendant unlawfully received welfare payments,

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[2] In *Richardson*, the defendant could be convicted of only one burglary because he entered two bedrooms in a single apartment shared by two roommates. The two bedrooms did not have exterior locks.

[3] Defendant's three-part test asks: (1) Does the evidence show that the burglary offenses were separate and distinct and not committed pursuant to one intention, general impulse and plan? (2) If so, was there a pause between entries sufficient to give the defendant a reasonable opportunity to reflect upon his conduct, such that his subsequent entry established a renewed or new and separate intent to burglarize the premises? (3) Consider factors such as whether an appreciable passage of time separates the acts or a reasonable opportunity for reflection. Can the first act be considered a completed act, for example, has the perpetrator reached a place of safety?

each less than $200 but aggregating to more than that amount. (*Bailey*, at p. 518.) The court instructed the jury that if the defendant committed several thefts pursuant to an initial design to take more than $200, then she was guilty of grand theft. But if there was no such initial design then the crime was petty theft. "Whether a series of wrongful acts constitutes a single offense or multiple offenses depends upon the facts of each case, and a defendant may be properly convicted upon separate counts charging grand theft from the same person if the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, on general impulse, and one plan." (*Id.* at p. 519.) *Washington* noted, however, that *Bailey* applies to theft cases, which are different than burglary cases. The focus of burglary is *entry*. If the *Bailey* rule were applied to burglary, then the defendant who goes to a house each day for five days to remove everything in the house would be guilty of only one count of burglary, because the defendant had one intention and plan: to remove everything from the house.

Washington similarly criticized *In re William S.*, the second case on which defendant relies. *In re William S.* tried to formulate a rule for multiple-entry burglary cases. Concerned that allowing separate convictions for every entry could lead to absurd results—for example, where a thief reaches through a window twice to try and steal the same geranium plant—the court said that when there is a pause sufficient to give defendant a reasonable opportunity to reflect on his conduct but the defendant nevertheless proceeds, a separate crime is committed. (*In re William S., supra,* 208 Cal.App.3d at p. 317.) *Washington* noted that *In re William S.* relied on a disapproved case as the legal basis for its rule. It also noted that a special rule was unnecessary for unlikely hypothetical situations like the geranium plant thief. (*Washington, supra*, 50 Cal.App.4th at p. 578.)

Instead of focusing on either the defendant's intent or the passage of time allowing for reflection, *Washington* says that the focus in burglary cases should be on entry. Entry is the appropriate focus because residential burglary "is designed not so much to deter trespass and the intended crime but to prevent risk of physical harm to others that arises upon the unauthorized entry itself." (*Washington, supra,* 50 Cal.App.4th at p. 577.) This

point is particularly salient where, as here, the two entries defendant made increased the risk of physical harm. Only Alvarez was at risk in the garage. Defendant and his accomplice could not have accessed the house through the garage. But when Sylvia opened the front door of the house, thereby giving defendant and his accomplice access to the house, this second entry by defendant into the house increased the risk of physical harm to Sylvia and the baby. We therefore conclude, based on these specific facts, that defendant could be convicted of two counts of burglary.

II. The upper term sentences.

On count 7, assault with a semiautomatic weapon on Walter, the trial court sentenced defendant to the upper term of 9 years and to the upper term of 10 years for the firearm use enhancement under section 12022.5, subdivision (a). Defendant now contends that his upper term sentences violate his Sixth and Fourteenth Amendment rights under *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Blakely v. Washington* (2004) 542 U.S. 296, *United States v. Booker* (2005) 543 U.S. 220, and *Cunningham*, *supra*, 549 U.S. 270.

Defendant committed the crimes at issue in December 2000. But he was not sentenced until January 7, 2008. At the time he was sentenced, the sentencing scheme in effect was the version of the Determinate Sentencing Law (DSL) that the Legislature amended effective March 30, 2007 (§ 1170, as amended by Stats. 2007, ch. 3, §§ 2, 7) in response to *Cunningham, supra,* 549 U.S. 270. The amendments make three basic changes to the procedure for imposing a term of imprisonment. First, the middle term is no longer the presumptive term. Second, the trial court has broad discretion to impose the lower, middle or upper term based upon a specified standard, i.e., that which "best serves the interests of justice." Third, the trial court need only set forth its reasons, but not facts, for imposing the lower, middle, or upper term. (§ 1170, subd. (d).) The trial court's "sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' " (*People v. Sandoval* (2007) 41 Cal.4th 825, 847 (*Sandoval*).)

Defendant acknowledges that the trial court had the discretion to impose the upper term under the amended statutory scheme. He also acknowledges that we are bound by *Sandoval*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Defendant, however, argues that applying the amended DSL to him would violate the due process and the ex post facto clauses of the federal Constitution. Defendant recognizes that the California Supreme Court in *Sandoval*, although not directly deciding the ex post facto and due process issues, nonetheless concluded "that the federal Constitution does not prohibit the application of the [Sen. Bill No. 40] revised sentencing process . . . to defendants whose crimes were committed prior to the date of [this] decision." (*Sandoval*, *supra*, 41 Cal.4th at p. 857.)

The court noted that a law violates the ex post facto clause only if it applies to events occurring before its enactment in a manner that substantively disadvantages the offender. (*Sandoval*, *supra*, 41 Cal.4th at pp. 853-854.) The amended DSL does not significantly disadvantage the offender because "the removal of the provision calling for imposition of the middle term in the absence of any aggravating or mitigating circumstance is not intended to—and would not be expected to—have the effect of increasing the sentence for any particular crime. Indeed, as applied to cases such as this one, in which defendant already has been sentenced to the upper term under the version of the DSL in place at the time she committed the offense, application of the revised sentencing scheme never could result in a harsher sentence and affords the defendant the opportunity to attempt to convince the trial court to exercise its discretion to impose a lower sentence. . . . Moreover, . . . the difference in the amount of discretion exercised by the trial court in selecting the upper term under the former DSL, as compared to the scheme we adopt for resentencing proceedings, is not substantial." (*Id.* at p. 855.)

Sandoval also indicates that there is no due process problem with sentencing a defendant under the amended DSL, even if the defendant committed the crime before the amendment. *Sandoval* explains that where the criminal statute at issue specifies the maximum sentence that may be imposed, such notice affords a defendant sufficient warning for due process purposes. (*Sandoval*, *supra*, 41 Cal.4th at p. 857.) Section 245,

subdivision (b), provides that any person who commits an assault upon the person of another with a semiautomatic firearm shall be punished by imprisonment in the state prison for three, six or nine years. Defendant was therefore on notice that he could be sentenced to nine years on the substantive crime.

Defendant next argues that even if the upper term sentence on the substantive crime can be upheld, the upper term sentence imposed for the firearm use enhancement cannot be upheld. He cites *People v. Lincoln* (2007) 157 Cal.App.4th 196. *Lincoln* explains that the Legislature amended the DSL by revising the provision stating that the court "shall" order the imposition of the middle term when sentencing on a *substantive* offense, unless there are circumstances in aggravation or mitigation of the crime (former § 1170, subd. (b)). The Legislature did not, however, similarly amend the provision relating to sentencing for *enhancements* under section 1170.1, subdivision (d). The provision in the amended DSL relating to enhancements continues to provide that " '[i]f an enhancement is punishable by one of three terms, the court shall impose the middle term unless there are circumstances in aggravation or mitigation.' " (§ 1170.1, subd. (d).) "This provision suffers from the identical constitutional infirmities identified by the United States Supreme Court in *Cunningham* . . . and is similarly unconstitutional." (*Lincoln*, at p. 205.)

The Attorney General concedes the correctness of *Lincoln*. But the Attorney General argues that any *Cunningham* error was nonetheless harmless under the standard in *Chapman v. California* (1967) 386 U.S. 18. Under that standard we ask whether, if the question of the existence of an aggravating circumstance or circumstances had been submitted to the jury, the jury's verdict would have authorized the upper term sentence. (*Sandoval*, *supra*, 41 Cal.4th at p. 838.)

The jury here found defendant guilty of, among others, assault with a semiautomatic weapon on Walter. The facts underlying this verdict are that Walter, at the time of the crime, was an eight-month-old baby. While Walter was in his bed,

defendant put a gun to his head and threatened to kill him. That a "crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness" is an aggravating circumstance, as is the fact that "[t]he manner in which the crime was carried out indicates planning." (Cal. Rules of Court, rule 4.421(a)(1) & (8).) The trial court essentially relied on the cruelty, viciousness and callousness of the crime when it imposed the upper term. The court said, "I can't think of anything more egregious than holding a loaded weapon to a little boy's head with the mother being present. It almost takes an animal to do something like that, not somebody that was even human. The conduct can only be described as almost beyond the realm of being sociopathic. [¶] But in that regard, court finds that this crime involved great violence, great bodily harm, and it was probably the cruelest and most vicious or callous thing that I can think of that you can do. [¶] So the court selects the high term of 9 years. Court uses the same factors. I'll also include that he used a weapon at the time he committed the crimes. That's another of what I believe is an aggravating factor that the jury found to be true. I also use those same factors. [¶] Not the use of the gun, because I think that would be a dual use about the way this crime was committed. [¶] The extreme cruelty, the danger that someone likes to present to the community like this, I select the high term on the gun use of 10 years."

We have no doubt that had this aggravating factor been submitted to the jury, it would have authorized the imposition of the upper term. Therefore, any error in sentencing defendant to the upper term was harmless.

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.